CAPITAL DYNASTY SDN BHD

v.

CHIANG BING & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING PETITION NO: D1 (D5)-26-97-2008]
19 FEBRUARY 2009

COMPANY LAW: *Arrangement, scheme of - Petition for sanction - Companies Act 1965, s. 176(4) - Scheme of arrangement proposed by liquidators for petitioner at Court Convened Creditors' Meeting - Scheme creditors voted in favour of - Objections by respondents - Classification of respondents as Scheme Creditors - Whether justified - Involvement of Secured Creditor classified together as Scheme Creditor and allowed to vote - Whether justified - Whether respondents through their conduct had waived their rights to object to SOA being sanctioned - Whether respondents' objections to petition had merit - Whether petition allowed*

This was a petition filed by the liquidators for the petitioner for *inter alia,* sanction of this court of the Scheme of Arrangement (SOA) between the petitioner and the Scheme Creditors pursuant to s. 176(4) of the Companies Act 1965. The SOA was proposed by the liquidators for the petitioner at a Court Convened Creditors Meeting that was held on 31 October 2008. The Scheme Creditors voted in favour of the SOA and the requisite statutory majority and numbers and value as provided under s. 176(3) of the Act were met. Briefly, the facts were that prior to being wound up, the petitioner was the developer of a piece of freehold commercial land known as Kemayan City. However, the project was only partially completed and had been abandoned by the petitioner since year 2000 leaving purchasers in the project stranded. In June 2007, the liquidators received a proposal from Blackstone Eight Sdn Bhd ('Blackstone') for the outright purchase of the land and the project which would be done *via* a SOA presented to the Scheme Creditors which would be made up of in effect, purchasers in the project. The rational of advancing *vide* a SOA pursuant to s. 176(1) of the Act was that it empowered liquidators for a wound up company to propose a scheme and proceeding by way of a court sanctioned SOA would ensure that as far as possible the rights of all the purchasers in the project

would be taken care of. At the Court Convened Meeting, the number of voting purchasers present and voting, inclusive of corporate representatives and those voting through proxies showed that 95% voted for the SOA while 5% was against. Having regard to the results above, the SOA between the petitioner and the Scheme Creditors achieved the statutory approvals at the said meeting. The respondents objected to the SOA because (a) it was the contention of the respondents that some of the interveners had fully paid or have paid up 90% of the purchase price of their respective units and the fact that some of the respondents have been provided vacant possession of their units with the issuance of the Certificate of Fitness by the local authorities, the respondents could not be deemed as creditors of the petitioner and as such could not be considered as Scheme Creditors under the SOA and (b) the respondent further argued that the Secured Creditor, Malaysia Building Society Berhad (MBSB) was classified as one of the Scheme Creditors and had exercised its voting right during the meeting and that the voting block by the Secured Creditor was as such as the other purchasers would be voted out.

Held (allowing petition with costs):

(1) The respondents were supplied with copies of the scheme papers prior to the meeting. The Explanatory Statement to the proposed SOA was part of the scheme papers. The basis and the classification of the purchasers in the project as Scheme Creditors were known to the respondents prior to the meeting. In fact, the respondents (save three) submitted their respective proof of debts and as such have submitted to the liquidators that they were creditors of the petitioner. Therefore, the challenge to the sanction on this basis was a mere afterthought. The respondent had on the one hand agreed to be deemed as creditors of the petitioner which in turn justified the liquidator to classify them as Scheme Creditors and propose the SOA. Had the respondents objected to being classified as Scheme Creditors or made part of the SOA, it was open for them upon being served with the Scheme Papers to take the necessary legal action to prevent the meeting from being conducted. Instead, the respondents through their conduct had acquiesced to the classification and the holding of the meeting. By filing its proof of debt and by attending or alternatively allowing the meeting to be conducted

they have waived their rights to raise this objection. By allowing the respondents to raise this objection at this stage it was highly prejudicial to the majority of the Scheme Creditors who voted in favour of the SOA during the meeting. (para 26)

(2) The classification of the respondents as Scheme Creditors was justified. Despite the fact that some of the respondents have fully paid for the units purchased from the petitioner and obtained vacant possession and even been provided with the certificate of fitness by the local authorities, they were still deemed as creditors of the petitioner as the petitioner could not be said to have complied with the terms and conditions under the sale and purchase agreements entered with the purchasers. The fact that the project had been abandoned and the project site dilapidated, the petitioner could not justifiably take the stand that since vacant possession had been granted the petitioner did not owe such purchasers any obligations. It would be unjust in the event the respondents who have been given vacant possession and certificate of fitness be excluded from the SOA. In any event, the exclusion of such respondents in the same class with other creditors (which may have not paid in full) was not prejudicial in any way to the respondents as the amount payable under the SOA was depended on the actual amount paid by the respective purchaser to the petitioner prior to winding up. (paras 26 & 27)

(3) In order for the SOA to be viable, the liquidators had entered into a conditional agreement with the Secured Creditor to settle part of the petitioner's indebtedness to the Secured Creditor by surrendering and vesting all legal and beneficial rights and interest in 531 units in the project based on the original selling price. Without the involvement of the Secured Creditor, there could be no solution to the impasse faced by the respondents and the purchasers in general. In fact, the involvement of the Secured Creditor directly benefited those purchasers whose units have not been disclaimed by the Secured Creditor (unredeemed purchasers) which for the purposes of the SOA were recognized by the Secured Creditor and thus able to reap the fruits of the SOA. Without this, the rights of the unredeemed purchasers were uncertain and if the

Secured Creditor had taken a hard stand on the matter, the Secured Creditor could foreclose on such unredeemed units irregardless of the rights of the unredeemed purchasers concerned. (para 30)

(4) Notwithstanding the benefits of the Scheme Creditors (including the respondents) and the liquidation of the petitioner and the fact that the project would have remained abandoned with no real monetary compensation to the purchasers without the involvement by the Secured Creditor in the SOA, the SOA would have almost been carried through without the voting block held by the Secured Creditors. Even without the Secured Creditor the votes by the Scheme Creditors for the SOA would be 74% while 26% against. The respondents have waived their rights to raise this objection against the Secured Creditor as they themselves failed to attend the meeting and to exercise their voting rights having been given notice of the meeting and filing their proof of debt. (paras 33 & 34)

(5) Since majority of the respondents did not object when the scheme papers were served on to them, filed their respective proof of debts and did not bother to turn up for the meeting, the court was of the impression that they had no objection to the SOA. In any event, by not exercising their rights to vote by turning up to the meeting must be deemed as a waiver of their rights to now object to the SOA being sanctioned. Hence, there was no merit in the respondents' objections to the petition. (para 36)

Legislation referred to:

Companies Act 1965, ss. 176(1), (3), (4), 218

For the petitioner - Shaikh Abdul Saleem (Felix Raj with him); M/s Shaikh David Raj

For the respondents - KH Tan; M/s Tan, Chua & Lawrence

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

[1] This is a petition filed by the liquidators for the petitioner for *inter alia*, sanction of this court of the Scheme of Arrangement (SOA) between the petitioner and the Scheme Creditors pursuant to s. 176(4) of the Companies Act 1965. The SOA was proposed by the liquidators for the petitioner at a Court Convened Creditors Meeting that was held on 31 October 2008 at The Puteri Pan Pacific Hotel, Johore Bahru (the meeting). The Scheme Creditors voted in favour of the SOA and the requisite statutory majority and numbers and value as provided under s. 176(3) of the Act were met.

Factual Background

[2] The petitioner is a company incorporated on 31 December 1993. On 27 December 2002, Hayat Berkat Sdn Bhd, a creditor of the petitioner presented a petition under s.218 of the Companies Act 1965 and on 5 November 2003, the Johor Bahru High Court made a winding-up Order against the petitioner and the official receiver was appointed as the provisional liquidator. On 17 June 2005, the Johor Bahru High Court appointed Mr. Lim Tian Huat and Mr. Duar Tuan Kiat of Messrs. Ernst & Young as the liquidators for the petitioner.

[3] Prior to it being wound up, the petitioner was the developer of a piece of freehold commercial land held under title HS(D) 200923 Lot No. PTD 63695 in the Mukim of Tebrau, District of Johor Bahru and State of Johor measuring approximately 50,105 square meters which is known as Kemayan City. This project currently comprises of a partially completed four (4) storey commercial complex and two (2) levels of completed car parks. The intention of the petitioner was to construct another four (4) levels of car parks, three (3) blocks of office towers and one (1) block of hotel.

[4] However, to date the project is only partially completed and has been abandoned by the petitioner since year 2000 leaving an estimated 966 purchasers in the project stranded.

[5] The project was financed by way of a term loan facility of RM30,000,000, a bridging loan facility of RM122,000.000 and additional bridging loan facility of RM20,000.000 (collectively "the loan facilities") which was granted by Malaysia Building Society Berhad ("secured creditor"). As a security for the financing facilities, the petitioner had granted the secured creditor two (2) first party first legal charges under the National Land Code over the said land *vide* Presentation No. 9440/95 Jilid 3212 Folio 66 ("first charge") and Presentation No. 25226/98 Jilid 4275 Folio 2 ("second charge"). The loan facilities remained outstanding.

[6] Since appointment, the liquidators have carried out two (2) proof of debt exercises on 1 September 2006 and 4 July 2008 for the end purchasers and the creditors in general to prove their debt and/or beneficial ownership of the units in accordance to the proving of debts provisions in the Act. The final cut-off date for the purposes of determining the liabilities of the scheme creditors against the petitioner pursuant to proof of debt exercise of the SOA was on 25 July 2008.

[7] The liquidators conducted two tender exercises for the purchase and/or rehabilitation of the project. There were four offers which were received but were rejected due to the price being too low or the conditions imposed were not acceptable to the liquidators or the secured creditor.

[8] In June 2007, the liquidators received a proposal from Blackstone Eight Sdn Bhd ("Blackstone") for the outright purchase of the land and the project which will be done *via* a SOA presented to the scheme creditors which will be made up of in effect, purchasers in the project.

[9] The rational of advancing *vide* a SOA pursuant to s. 176(1) of the Act is that s. 176(1) empowers liquidators for a wound up company to propose such a scheme. The books and records of the petitioner are currently in the Securities Commission ("SC")'s custody to facilitate their investigation into the affairs of the petitioner prior to the winding up. Therefore the liquidators were unable to confirm the purchasers' listing due to the incomplete books and records. Proceeding by way of a court sanctioned SOA would ensure that as far as possible the rights of all the purchasers in the project are taken care off. Due to the large

number of scheme creditors, a SOA would be the most equitable approach to ensure that the interest of the majority of the scheme creditors is protected.

[10] The purchase by Blackstone of the land and the project is to be done in two (2) parts, namely the purchase of the land and the unsold units in the project from the liquidators and secondly, the purchase of the sold units in the project from the purchasers in the project.

[11] Following this proposal the petitioner entered into a conditional sale and purchase agreement with Blackstone on 6 June 2008 for the purchase of the land and the unsold units and at the same time entered into a conditional settlement agreement with the secured creditor to settle part of the petitioner's debt.

[12] Blackstone also issued a conditional letter of offer which was accepted by the liquidators for proposed acquisition of the sold units. The sale and purchase agreement, the settlement agreement and the letter of offer are conditional upon the SOA being accepted by the scheme creditors and sanctioned by the court. It was a condition precedent of the sale and purchase agreement that the court sanction for the SOA be obtained within nine months from the date of the sale and purchase agreement, ie, by 6 March 2009.

[13] The liquidators have formulated and are proposing for a specific class of creditors, namely the scheme creditors which in effect are made up of purchasers of units in the project and categorized in the following manner:

Voting Purchasers

(a) the end purchasers with valid executed SPAs who have proved their claims according to the proving of debts provisions in the Act for the purposes of the SOA in relation to the respective units and which have not been assigned to the end financiers;

(b) the end financier to whom the end purchasers have absolutely assigned their rights to their respective units pursuant to the deeds of assignment and who have proved their claims according to the proving of debts provision in the Act for the purposes of the SOA;

(c) the secured creditor, by virtue of the units under the settlement agreement in relation to its respective units;

Non-Voting Purchasers

(d) end purchasers and/or end financiers who have not proved their debts for the purposes of the proposed SOA although their respective units have been disclaimed by MBSB as the chargee;

(e) end purchasers and/or end financiers who have submitted their proof of debts but have been duly rejected or have not been admitted by the liquidators according to the proving of debts provisions in the Act for the purposes of the SOA although their respective units have been disclaimed by MBSB.

[14] Whilst being able to benefit from the SOA upon receipt of sanction by this court, the scheme creditors in categories (d) and (e) were not allowed to vote during the meeting as they have failed to properly prove their debts. For the purposes of voting at the meeting, each unit purchased by or vested in the scheme creditors constituted one vote.

The Respondents

[15] Majority to the respondents above fall into the category of purchasers whose units have not been disclaimed by the secured creditor ("unredeemed purchasers"). In fact out of the 50 units represented by the respondents above, 25 of the respondents are regarded as unredeemed purchasers of 32 units in the project.

[16] Despite the scheme papers having been served on the respondents (save for two who did not revert to prior notices by the liquidators), only nine of the respondents bothered to turn up either themselves or by proxy for the meeting.

Salient Terms Of The SOA

[17] The total sum of RM102,670.000 (offer sum) has been offered by Blackstone for the purposes of the SOA. Out of this, the sum of RM3,000.000 (contingent sum) will be set aside for the purposes of considering the claims of the contingent purchasers ie, other purchasers which may be duly admitted by the liquidators in accordance to the provisions of the Act, subsequent to final cut-off date but prior to completion of the SOA.

[18] The offer sum less the contingent sum and any outgoings such as unpaid assessment to the local authorities is to be distributed to the scheme creditors. This would translate to a settlement of approximately RM0.219 for every RM1 of the progress payment of all the scheme creditors. The remaining progress payment owed by the petitioner to the scheme creditors shall be waived and the LAD shall be treated as unsecured creditors claims under the liquidation process of the company in accordance with s. 292 of the Act.

[19] Once the SOA is sectioned, Blackstone shall pay into a joint stakeholders' account the offer sum tentatively expected in the second half of 2009. An extension of time shall be granted to Blackstone for the payment into the joint stakeholders' account, if requested up to 12 months thereafter, subject to late payment interest of 8% per annum.

[20] Thereafter, upon receipt of the offer sum from the joint stakeholders' account, the liquidators shall distribute to the voting purchasers their respective share. The liquidators shall only distribute to the non-voting purchasers their respective share if the non-voting purchasers have proved their progress payment and have been duly admitted by the liquidators according to the proving of debts provision in the Act.

[21] For the purposes of the SOA, the secured creditor will waive its rights as charge over the unredeemed units comprising such end purchasers who have proved their progress payments and have been duly admitted by the liquidators according to the proving of debts provisions in the Act but for which the secured creditor has not received the payments.

Outcome Of The Court Convened Meeting

[22] There was a total of seven hundred and ten (710) voting purchasers representing a total value of RM317,867,997.61 present at the meeting. Out of the seven hundred and ten (710) voting purchasers, there were fifteen (15) voting purchasers representing a total value of RM6,386,322.50 who were not eligible to vote in the meeting because they could not provide the documents during registration.

[23] The number of voting purchasers present and voting, inclusive of corporate representatives and those voting through proxies shows that 95% voted for the SOA while 5% against.

[24] The petitioner had engaged the services of Mr Se Kuo Shen, from Messrs BDO Consulting Sdn Bhd to act as an Independent Scrutineer to facilitate the tabulation of votes for the meeting. Having regard to the results set out above, the SOA between the petitioner and the Scheme Creditors achieved the statutory approvals at the said meeting.

The Respondents' Objections To The Petition

[25] The respondents' objections to the SOA can be summarized into two issues, namely:

(a) **Their Classification As Scheme Creditors**

The respondents are contending that the fact that some of the interveners have fully paid or have paid up 90% of the purchase price of their respective units and the fact that some of the respondents have been provided vacant possession of their units with the issuance of the certificate of fitness by the local authorities, the respondents cannot be deemed as creditors of the petitioner and as such cannot be considered as scheme creditors under the SOA; and

(b) The respondent are also taking issue on the involvement of the secured creditor being classified together as a scheme creditor and allowed to vote during the CCM.

Objection (a)

[26] The court is of the view that Objection (a) is misconceived and without any legal basis for the following reasons:

(a) the respondents were supplied with copies of the scheme papers prior to the meeting. The explanatory statement to the proposed SOA was part of the scheme papers. The basis and the classification of the purchasers in the project as scheme creditors were known to the respondents prior to the meeting. In fact, the respondents (save for three) submitted their respective proof of debts and as such have submitted to the liquidators that they are creditors of the petitioner;

(b) it is therefore clear that the challenge to the sanction on this basis is a mere afterthought. The respondent have on the one hand agreed to be deemed as creditors of the petitioner which in turn justifies the liquidator to classify them as scheme creditors and propose the SOA. Had the respondents objected to being classified as scheme creditors or made part of the SOA, it was open for them upon being served with the scheme papers to take the necessary legal action to prevent the meeting from being conducted. Instead, the respondents through their conduct had acquiesced to the classification and the holding of the meeting;

(c) the court is also of the view that by filing its proof of debt and by attending or alternatively allowing the meeting to be conducted they have waived their rights to raise this objection. By allowing the respondents to raise this objection at this stage is highly prejudicial to the majority to the scheme creditors who voted in favour of the SOA during the meeting;

(d) in any event, the classification of the respondents as scheme creditors is justified. Despite the fact that some of the respondents have fully paid for the units purchased from the petitioner and obtained vacant possession and even been provided with the certificate of fitness by the local authorities, the court is of the view that they are still to be deemed as creditors of the petitioner as the petitioner cannot be said to have complied with the terms and conditions under the sale and purchase agreements entered with the purchasers. The fact that the project has been abandoned and the project site dilapidated, the petitioner cannot justifiably take the stand that since vacant possession has been granted the petitioner does not owe such purchasers any obligations;

(e) further, each purchaser would have executed a sale and purchase agreement and a Deed of Mutual Covenant. Looking at the state of the project site and taking into account the fact that no purchaser has quiet enjoyment of their units, the purchasers must still be considered to be creditors of the petitioner despite the fact that the payment obligations under the sale and purchase agreement and Deed of Mutual Covenants having been met by the purchasers; and

(f) it would be unjust in the event the respondents who have been given vacant possession and certificate of fitness be excluded from the SOA. In any event, the exclusion of such respondents in the same class with other creditors (which may have not paid in full) is not prejudicial in any way to the respondents as the amount payable under the SOA is depended on the actual amount paid by the respective purchaser to the petitioner prior to winding up.

[27] Based on the aforesaid the court finds that Objection (a) is not a justifiable basis for this court to refuse to sanction the SOA and even if this court finds merit in Objection (a), the interests of the other scheme creditors which supported the SOA and met the statutory approval would override the interests of these interveners who form the minority.

Objection (b)

[28] The basis of Objection (b) is that the secured creditor, Malaysia Building Society Berhad (MBSB) was classified as one of the scheme creditors and had exercised its voting rights during the meeting. The respondents also contend that the voting block by the secured creditor was as such as the other purchasers would be voted out.

[29] This fact is not denied and was expressly stated in the explanatory statement which was sent to every scheme creditor. It was not a situation where it was only made known to the scheme creditors in the morning of meeting as alleged. It was clearly stated in the explanatory statement.

[30] In order for the SOA to be viable, the liquidators had entered into a conditional agreement with the secured creditor to settle part of the petitioner's indebtedness to the secured creditor by surrendering and vesting all legal and beneficial rights and interest in 531 units in the project based on the original selling price. Without the involvement of the secured creditor, there can be no solution to the impasse faced by the respondents and the purchasers in general. In fact, the involvement of the secured creditor directly benefits those purchasers whose units have not been disclaimed by the secured creditor (unredeemed purchasers) which for the purposes of the SOA were recognized by the secured creditor and thus able to reap the fruits of the SOA.

Without this, the rights of the unredeemed purchasers are uncertain and if the secured creditor takes a hard stand on the matter, the secured creditor can foreclose on such unredeemed units irregardless of the rights of the unredeemed purchasers concerned.

[31] Out of the 50 units represented by the interveners above, there are 32 units represented by 25 respondents (including the joint named purchasers) are considered as unredeemed purchasers. These interveners have directly benefited from the SOA by having the secured creditor waive its interest as charges over the unredeemed units.

[32] Another benefit of the inclusion of the secured creditor is the fact that the liquidators were able to set off a substantial part of the indebtedness of the petitioner. The liquidators were able to set off RM240,032,996.80 (calculated based on the original sale price prior to winding up for 531 units) out of the indebtedness of the secured creditor at approximately RM266,402,388.50.

[33] Notwithstanding the benefits to the scheme creditors (including the respondents) and the liquidation of the petitioner and the fact that the project will remain abandoned with no real monetary compensation to the purchasers without the involvement of the secured creditor in the SOA, the SOA would have almost been carried through without the voting block held by the secured creditors. Even without the secured creditor the votes by the scheme creditors for the SOA would be 74% while 26% against.

[34] The respondents has waived their rights to raise Objection (b) against the secured creditor as they have themselves failed to attend the meeting and to exercise their voting rights having been given notice of the meeting and filing their proof of debt.

[35] In any event, whilst the secured creditor's votes would meet the majority in numbers, the secured creditor's votes would not have met the required statutory approval with regards to having 75% in value. In order for the SOA to be passed, the votes from other scheme creditors were imperative.

[36] Since majority of the respondents did not object when the scheme papers were served on to them, filed their respective proof of debts and did not bother to turn up for the meeting, the court is of the impression that they have no objection to the SOA. In any event, by not exercising their rights to vote by turning up to the meeting must be deemed as a waiver of their rights to now object to the SOA being sanctioned on the above grounds.

Conclusion

[37] On the above consideration, the court finds there is no merit in the respondents' objections to the petition. Therefore the petition is allowed with costs.